

Louisiana Law Review

Volume 51 | Number 5

May 1991

McCrary v. Park South Properties: Entering Dangerous Grounds: The Use of Equitable Remedies in Commercial Lease Disputes

Geoffrey J. Orr

Repository Citation

Geoffrey J. Orr, *McCrary v. Park South Properties: Entering Dangerous Grounds: The Use of Equitable Remedies in Commercial Lease Disputes*, 51 La. L. Rev. (1991)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol51/iss5/11>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

McCrary v. Park South Properties: Entering Dangerous Grounds: The Use of Equitable Remedies in Commercial Lease Disputes

I. INTRODUCTION

A great number of leases are executed for commercial purposes. Equipment, edifices, land, rights and labor are commonly objects of modern commercial leases. Due to the economic importance of leases, parties to a commercial lease often employ exacting and specific terms in the lease for protection of their business and economic welfare.¹

Such was the case in *McCrary v. Park South Properties*.² The lessor in *McCrary* challenged the continuing validity of the lease and sought cancellation. The court, finding for the defendant-lessees, held that the lessors had no right to cancellation of the lease. It suspended the lease for the duration of the litigation so that, in effect, the lease term was extended for approximately nine years beyond the date when the lease would have terminated by its own accord. The purpose of this note is to analyze the basis for and pragmatism of the suspension and extension of a commercial lease as a remedy for the lessee when the lessor's claim for cancellation is denied. An analysis of this remedy in the context of commercial leases is significant because the commercial lease is an often-utilized business method, the remedy utilized in *McCrary* is relatively uncommon, and there has been no significant revision of the lease articles³ since their original codification. In an effort to examine the outcome in this case, this note, after giving a summary of the specific facts of the *McCrary* case, evaluates past Louisiana jurisprudence, discusses the dearth of similar remedies in Louisiana surface⁴ lease cases, and looks at common law jurisdictions' treatment of the issue. The

Copyright 1991, by LOUISIANA LAW REVIEW.

1. See, e.g., *Saucier v. John-Clai Co.*, 408 So. 2d 27 (La. App. 3d Cir. 1981); *Convert-A-Bed, Inc. v. Salem*, 360 So. 2d 605 (La. App. 4th Cir. 1978); *Taylor Lumber Co., Inc. v. Fuller*, 292 So. 2d 878 (La. App. 1st Cir.), writ denied, 294 So. 2d 839 (1974).

2. 560 So. 2d 38 (La. App. 2d Cir.), writ denied, 563 So. 2d 1156 (1990).

3. La. Civ. Code arts. 2688-2776.

4. "Surface" leases are meant to contrast with "mineral" leases in the context of this note. However, this is not intended to limit the application of this discussion to leases of immovable property alone; rather, it is intended to cover all leases outside the mineral lease context.

Louisiana Civil Code articles relating to the issues in *McCrary* also will be examined. Next, French doctrine interpreting comparable articles in the Code Napoleon is scrutinized and the development of French law in this area is traced. Finally, analysis and recommendation is offered for the treatment of disputes involving commercial leases. In that analysis, this note questions the use of equity in a commercial situation and offers to courts a prudent and fair method of relief and standards of judgment based on present code provisions relating to damages.

II. THE SITUATION IN *McCrary*

The lease executed in *McCrary* called for a term of fifty years and covered a thirty-one and one-half acre tract of undeveloped urban property.⁵ It was the defendants' intent as lessees to develop the acreage into a shopping mall.⁶ The defendants were aware prior to entering the lease of the recent completion of what would be a competing shopping mall development.⁷ Nevertheless, the lease was confected including terms that "the property be developed as a regional commercial center."⁸ The lessors stood to receive, in addition to base rentals, a premium rental based on the future prosperity of the development. The lessors' intent was to cause their asset, consisting of unimproved land, to become a long-term revenue generator.

Lessees, obviously contemplating the improvidence and limited feasibility of financing a mall development while there was competition already in place, chose to develop "out-parcel tracts on the property and to delay developing the remainder of the tract until the adjacent mall had . . . become fully leased."⁹ As a result of this decision, the lessees decided to sublet two portions of the ground: one for use as a branch bank, another for use as an automotive service facility.¹⁰

The lessors perceived these subleases and the lack of other commercial development to be outside of the contractual intention and therefore a failure to develop the property in accordance with the terms of the lease. As a result, the lessors placed the lessees in default by certified letter and later brought suit for cancellation of the lease due to the defendants' alleged breach of the development provision.¹¹

The trial court found that the lessees, not the lessors, had the discretion, according to the lease, of when and how to develop the

5. 560 So. 2d at 41.

6. *Id.*

7. *Id.*

8. *Id.* at 42.

9. *Id.*

10. *Id.*

11. *Id.*

property.¹² The trial court believed that two "highly skilled representatives who were well versed in the nuances of the commercial real estate market" would have provided more specific terms for development had that been their intention.¹³ Plaintiff-lessors were denied cancellation. More important, because the defendant-lessees had maintained that the plaintiffs' default letter "constituted a legal obstacle which had wrongfully prevented [the lessees] from commercially developing the property," the trial court ruled that defendants "were entitled to have the initial term of the original ground lease *suspended* and *extended* by a period of time equal to and commensurate with the period beginning . . . when the plaintiffs slandered defendants' title . . . and ending when this proceeding was finally adjudicated."¹⁴ Further, the court allowed the defendants to retain all rents that came due during the suspension, even though the defendants had collected rents from their sublessees.

The plaintiff-lessors argued on appeal that the default notice was not a cloud on defendants' title and that the defendants were not entitled to a suspension and extension of the lease term.¹⁵ The plaintiff-lessors maintained that "defendants were unjustly enriched by the suspension of the lease since [the defendants] were allowed to collect significant rents from subtenants while paying no base rent to plaintiffs"¹⁶ The court of appeal rejected this argument, holding that the suspension and extension of the lease term was "an effort to fashion an equitable remedy which would place the parties as nearly as possible in the position they occupied prior to the interruption of defendants' peaceable possession" and, because the term of the lease was extended, the defendants would be obligated to pay rentals beyond the original term, thereby eliminating, in the court's interpretation, any unjust enrichment.¹⁷

The court's ruling, in effect, extended the term of the lease for a period of approximately nine years. The appellate court characterized this as an "equitable" remedy. The court cited no authority for the action taken and did not distinguish whether this arose from a common law notion of equity or from "équité" as provided for in the Louisiana Civil Code.¹⁸

12. Id. at 43.

13. Id. The language quoted here from the appellate opinion demonstrates that the court believed the trial court's assessment that both parties were of equal bargaining power and, consequentially, that equitable considerations of "estoppel" or "unconscionability" are not at issue between these sophisticated parties.

14. Id. at 43-44 (emphasis added).

15. Id. at 49.

16. Id. at 50.

17. Id.

18. See, e.g., La. Civ. Code arts. 4, 2053, 2055. See also *infra* text accompanying notes 76-88.

III. JURISPRUDENCE

A. *Louisiana*1. *Mineral Leases*

The court in *McCrory* granted relief on the theory that the lessor had interrupted the peaceable possession of the lessee.¹⁹ The use of such a remedy to suspend and extend the term of a lease when a lessor challenges the continued validity of a lease has its origins in the jurisprudence of Louisiana concerning mineral leases.²⁰ The remedy of lease suspension was jurisprudentially devised to address the peculiarities of mineral exploration and the common requirements set out in the provisions included within mineral leases. Mineral leases commonly require the lessee to begin efforts to develop the land for mineral production within a certain time or, in the alternative, to pay delay rentals. These leases, either expressly or impliedly, give the lessor a right to cancel the lease for failure to develop or pay rentals within that term. Because a mineral lessee would not explore for minerals if the validity of his lease was questionable (due to the cost-risk factors involved in mineral exploration), courts have fashioned a remedy for lessees who prevail under the lessor's challenge for cancellation by ordering an extension of time added to the lease term in which the lessee could begin development.²¹ As one court expressed it:

By filing and prosecuting these suits, plaintiffs have made it utterly impracticable for the assignees of the lessee to exercise the rights granted by the leases. Having made it thus impracticable by their own acts, plaintiffs are not in position to contend that the leases have expired. The period of litigation should not be included in determining when the leases expire.²²

This has become accepted jurisprudence in the mineral law of the state, but it was not made part of the Mineral Code upon its adoption in 1974.²³ The mineral law jurisprudence, however, has considered this

19. 560 So. 2d at 50.

20. See, e.g., *Baker v. Potter*, 223 La. 274, 65 So. 2d 598 (La. 1953); *Knight v. Blackwell Oil & Gas Co.*, 197 La. 237, 1 So. 2d 89 (La. 1941); *Fomby v. Columbia County Dev. Co.*, 155 La. 705, 99 So. 537 (La. 1924); *Standard Oil Co. v. Webb*, 149 La. 245, 88 So. 808 (La. 1921); *Gulf Refining Co. v. Hayne*, 148 La. 340, 86 So. 891 (La. 1920).

21. See the cases cited in *supra* note 20.

22. 155 La. at 719, 99 So. at 542.

23. La. Acts 1974, No. 50 enacted La. R.S. 31:1-:214 as the Louisiana Mineral Code. See especially, La. R.S. 31:119-:121 (1989) (obligations of the lessor—the lessor is bound to not disturb the lessee's possession, but the code does not outline a remedy of this nature).

remedy a granting of specific performance, not a resort to equity.²⁴

Several factors distinguish surface leases from mineral leases and thus make application of mineral law jurisprudence inappropriate. The sub-letting of retail commercial space does not involve equivalent cost-risk factors. There are no dry holes to account for in such an instance. Were a lessee of a surface lease to construct buildings or make other improvements for the purpose of sub-letting only to have his lease subsequently canceled, the law would provide a remedy to the lessee for the value of his improvements.²⁵ In contrast, if the mineral lessee begins drilling the value of exploration is speculative. Thus, the impairment of the surface lessee's ability to continue commercial operations is not as grave as a mineral lessee's. Further, most of the mineral lease cases granting this relief involved leases that had expired by the time the litigation ended.²⁶ The primary term of the lease in *McCrory* was not to expire until the year 2024. Defendant-lessees had ample time to continue development. The mineral law of this state was developed from the general law relating to leases, property, and obligations. However, it was developed for the specific purpose of regulating a complex, capital intensive industry and should be confined to that application.

The court in *McCrory* did not, however, allude to these cases. In fact, the court cited no authority whatsoever for its decision. Regardless, the rights of lease parties in surface leases should not be determined by rules developed for the mineral lease area. Additionally, there exists a body of mineral law jurisprudence which can serve to give notice to the parties of the consequences of a putting in default in mineral leases. In contrast, in a surface lease situation, the lessor has not, until *McCrory*, had reason to contemplate this risk.

2. Surface Leases

Outside of the mineral lease context, Louisiana courts occasionally have fashioned similar remedies in suits involving surface leases, but

24. 148 La. at 346, 86 So. at 893 ("[T]he only reason why a breach of any contract gives rise ordinarily only to an action in damages is that ordinarily specific performance cannot be enforced. However, performance being the more complete remedy, there can be no reason why it should not be allowed in cases where it is available and is demanded."). Compare *infra* text accompanying notes 94-95. Additionally, the use of this relief in mineral leases has had some unusual effects on the rights of third parties acquired under the public records doctrine. See *Standard Oil Co. v. Webb*, 149 La. 245, 255-64, 88 So. 808, 811-15 (Dawkins, J., dissenting) (A later vendor of the original lessor loses his right to execute a valid lease, having relied on the public records that the lease was expired, because the original lessor disturbed the possession of the lessee subsequent to the sale of the property.).

25. See La. Civ. Code art. 496.

26. The typical mineral lease in Louisiana has a primary term of five years. La. R.S. 31:115 (1989) limits the continuance of a mineral lease without mining, drilling operations or production occurring to an effective term of ten years at most.

these cases are very infrequent and dated.²⁷ Notably, the only such instances found where courts have "suspended" or "extended" a non-mineral lease were two cases that arose in the commercial context.

In *Davis v. McConnell*²⁸ the court extended the term of a one-month equipment lease by fourteen days when the equipment turned out to be defective and unusable for the purpose intended.²⁹ The court relied upon Louisiana Civil Code article 2695³⁰ and its requirement that the landlord "maintain the thing in a condition such as to serve for the use for which it is hired."³¹ *Davis*, however, did not involve the landlord's interference with the lessee's "peaceable possession" as did *McCrary*.

The most notable instance, since it involved commercial real estate, using the kind of action taken in *McCrary* concerned the lease of immovable property intended for use as a gas station. In *William v. James*,³² the plaintiff had contracted to lease the premises from the defendant, but the defendant refused to deliver possession, claiming that the description of the property in the lease was insufficient.³³ The supreme court, having found that the description errors were reasonable and reconcilable, addressed the plaintiff's request for extension of the primary lease term so as to begin his five year term when he would be put into possession.³⁴ The court perceived "no reason why the lessor should be allowed to deprive the lessee of a part of the term of his lease by withholding possession of the leased premises *without just cause*."³⁵ Notably, in *Williams*, the lessor had not delivered possession

27. It should be noted that the cases found where the courts have previously granted relief by suspending a lease term may not be exhaustive. The cases noted in this section represent all the cases found in this author's research. While more instances may exist, this research revealed only two instances where, outside of the mineral lease context, the court fashioned a remedy in this manner for a lessee.

28. 146 So. 54 (La. App. 2d Cir. 1933).

29. *Id.* at 58.

30. La. Civ. Code art. 2695 reads:

The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent its being used even in case it should appear he knew nothing of the existence of such vices and defects, at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee; and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same.

31. La. Civ. Code art. 2692(2). The full text of article 2692 is quoted in *infra* note 52.

32. 188 La. 884, 178 So. 384 (La. 1938).

33. *Id.*

34. *Id.* at 891, 178 So at 386.

35. *Id.* (emphasis added). See *infra* text accompanying notes 98-99.

at all,³⁶ and his motivations were obviously suspect to the court. Further, this case has historically been considered in the mineral law context and not applied to surface leases.³⁷

The *McCrary* court did not reveal any motives or reasons other than "equity" behind its choice of remedies. *Williams* and *Davis* represent the extent of non-mineral cases where courts had previously utilized extension or suspension as a remedy for an aggrieved party to a lease, an action not taken since the 1930's when *Williams* and *Davis* were decided. As will be shown below, these cases are exceptional among those concerning remedies for a lessor's interference with the lessee's possession.

3. Traditional Remedies in Surface Leases

Commonly, and perhaps traditionally, within the context of leases of immovables for commercial or non-commercial purposes, the Louisiana courts have offered relief not in equity but in traditional concepts of contractual damages as provided in the Louisiana Civil Code provisions governing obligations.³⁸ In a number of cases involving com-

36. La. Civ. Code art. 2692(1). The full text of article 2692 is quoted in *infra* note 52.

37. See Bullis, Bench and Bar—Recent Louisiana Jurisprudence Regarding Landowners' Rights in a Proven Oil or Gas Field, 14 Tul. L. Rev. 423, 425 n.5 (1940); Nabors, The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute, 26 Tul. L. Rev. 23, 45 n.390 (1951); Tracey, The Effects of Top Leasing in the Louisiana Law of Oil & Gas, 43 La. L. Rev. 1189, 1196 n.27 (1983). See also *Baker v. Potter*, 223 La. 274, 284, 65 So. 2d 598, 601, (La. 1953).

38. See La. Civ. Code arts. 1994-2002. Those articles state:

Art. 1994. Obligor liable for failure to perform

An obligor is liable for the damages caused by his failure to perform a conventional obligation.

A failure to perform results from nonperformance, defective performance, or delay in performance.

Art. 1995. Measure of damages

Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived.

Art. 1996. Obligor in good faith

An obligor in good faith is liable only for the damages that were foreseeable at the time the contract was made.

Art. 1997. Obligor in bad faith

An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.

Art. 1998. Damages for nonpecuniary loss

Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract,

mercial leases, an interruption of the lessee's peaceable possession³⁹ by the lessor has left the lessee with the burden of proving actual damages.⁴⁰ The courts have adhered to this requirement regardless of the lessor's methods or inferences as to his motives.⁴¹ Lessees have been relegated to these damage standards for their remedy even where the lessor's interference with the lessee's possession was an effort to "get rid of [the lessee] as his tenant." The court held in such an instance that even though the lessor failed in his effort to rid himself of the lessee, "it is not *shown* that, by the attempt, the [lessee] was injured."⁴²

Under a perfunctory count alone, the instances where the Louisiana courts have merely awarded provable damages to compensate the lessee

the obligor knew, or should have known, that his failure to perform would cause that kind of loss.

Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee.

Art. 1999. Assessment of damages left to the court

When damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages.

Art. 2000. Damages for delay measured by interest; no need of proof; attorney fees

When the object of the performance is a sum of money, damages for delay in performance are measured by the interest on that sum from the time it is due, at the rate agreed by the parties or, in the absence of agreement, at the rate of legal interest as fixed by Article 2924. The obligee may recover these damages without having to prove any loss, and whatever loss he may have suffered he can recover no more. If the parties, by written contract, have expressly agreed that the obligor shall also be liable for the obligee's attorney fees in a fixed or determinable amount, the obligee is entitled to that amount as well.

Art. 2001. Interest on interest

Interest on accrued interest may be recovered as damages only when it is added to the principal by a new agreement of the parties made after the interest has accrued.

Art. 2002. Reasonable efforts to mitigate damages

An obligee must make reasonable efforts to mitigate the damage caused by the obligor's failure to perform. When an obligee fails to make these efforts, the obligor may demand that the damages be accordingly reduced.

La. Civ. Code arts. 1994-2002. Compare *Pacific Express Co. v. Haven*, 41 La. Ann. 811 (1889) (commercial application) with *Grace v. Haas*, 20 La. Ann. 73 (1868) (non-commercial application).

39. See La. Civ. Code art. 2692(3). The full text of Article 2692 is quoted in *infra* note 52.

40. See, e.g., *Dehan v. Youree*, 161 La. 806, 109 So 498 (La. 1926); *Bennett v. Weinberger*, 160 La. 1001, 107 So 780 (La. 1926); *Pierre Mengelle & Co. v. Abadie*, 48 La. Ann. 669, 19 So. 670 (1896); *Creole Corp. v. McMillan*, 379 So. 2d 805 (La. App. 4th Cir. 1980).

41. See, e.g., *Knox v. Booth*, 19 La. Ann. 109 (1867); *Moity v. Castille*, 469 So. 2d 503 (La. App. 3d Cir. 1985); *Fo-Coin Co. v. Drury*, 349 So. 2d 382 (La. App. 4th Cir. 1977).

42. 19 La. Ann. at 110 (emphasis added).

suffering interference by the lessor far outnumbers the few cases where equitable relief has been used to remedy the lessee's plight. In fact, in instances that perhaps warranted drastic relief for the lessee, the courts have failed to recognize any need for a resort to equity.⁴³

B. Common Law Jurisprudence

The common law jurisdictions are likewise devoid of instances of remedies such as the one employed in *McCrary*.⁴⁴ The common law jurisdictions do, for the most part, recognize a covenant of peaceable or quiet enjoyment for the benefit of the lessee guaranteed by the lessor.⁴⁵ Their relief, however, follows the path of the majority of Louisiana cases: actual damages.⁴⁶ Although some common law jurisdictions employ equity in the form of injunctive relief where a lessor's interference amounts to trespass,⁴⁷ the general consensus is to award damages.⁴⁸ In fact, the exceptional approach used by the Louisiana Supreme Court in *Williams v. James*⁴⁹ was specifically and summarily rejected by one common law jurisdiction. In *Peachtree on Peachtree Investors v. Reed Drug Co.*,⁵⁰ the Georgia Supreme Court, rejecting the equitable remedy

43. See *Baldo v. Thibodeaux* 336 So. 2d 1075 (La. App. 4th Cir. 1976). See also *Bennett v. Weinberger*, 160 La. 1001, 1007, 107 So. 780, 782 (La. 1926) ("[T]he court would [not] be authorized to make an arbitrary assessment of damages. We therefore find no justification for increasing the amount allowed by the judgment below.").

44. Research performed in that context reveals no cases in the United States, outside of Louisiana, employing an equitable extension of a lease term to effect a remedy for a lessee whose peaceful possession has been disturbed.

45. See generally 2 H. Tiffany, *Treatise on the Law of Landlord and Tenant* § 353(b), 2124-30 (1912) [hereinafter Tiffany]; 2 R. Powell & P. Rohan, *Powell on Real Property*, ¶ 232[1] (1988) [hereinafter Powell]; Restatement (Second) of Property, § 6.1 (1977). See also Cal. Comm. Code § 10211 (West 1990); Md. Real Prop. Code § 8-204 (1988); Mass. Gen. L. Ch. 186 § 14 (1981); S.D. Codified Laws Ann. § 43-32-6 (1983); W. Va. Code § 36-4-14 (1985). Compare La. Civ. Code art. 2692.

46. Powell, *supra* note 45, at ¶¶ 232[3] and 231[1]b (Additionally, the lessee may be entitled to a termination of the lease depending on the severity of the interference with his possession); Tiffany, *supra* note 45, at Vol. 1, § 85, 547-52. Restatement (Second) of Property § 6.1, *supra* note 45, outlines the damage remedies and equitable remedies to a landlord's interference. Among those remedies are the abatement of rent. (Compare La. Civ. Code art. 2700.) Absent from those equitable remedies is any indication that substantive terms of the lease may be altered, aside from the amount of the rent. In essence, abatement of the rent, since rent is normally paid in money, is damages.

47. See, e.g., *Baltimore Butchers Abattoir & Live Stock Co. v. Union Rendering Co.*, 179 Md. 117, 17 A. 2d 130 (Md. App. 1941); *Winchester v. O'Brien*, 266 Mass. 33, 164 N.E. 807 (Mass. 1929).

48. See *supra* note 46 and authorities cited therein. For an application, see *City of New York v. Pike Realty Corp.*, 247 N.Y. 245, 160 N.E. 359 (N.Y. 1928).

49. 188 La. 884, 178 So. 384 (La. 1938). See *supra* text accompanying notes 32-37 for the discussion of *Williams*.

50. 251 Ga. 692, 308 S.E.2d 825 (Ga. 1983).

used in *Williams*, turned to sections 364 and 366 of the Restatement (Second) of Contracts, stating that such an award of specific performance should "be refused if it would cause unreasonable hardship or loss to the party in breach . . . [and] if the enforcement and supervision of such a decree places too great a burden on the court."⁵¹

IV. LOUISIANA CODE PROVISIONS AND THEIR SOURCE

In Louisiana, the obligations of a lessor, created by the contract of lease, are governed in part by Louisiana Civil Code article 2692.⁵² This article has remained, with minor grammatical change, identical to its original codification in Louisiana in 1808.⁵³ It is also virtually identical to article 1719 of the Code Napoleon of 1804,⁵⁴ making analysis of the doctrine concerning that provision relevant to the interpretation of Louisiana Civil Code article 2692. In essence, Article 2692 forms the source of the lessor's obligation to keep the lessee in peaceable possession which was breached by the lessor in *McCrary* and under which a right to relief flowed to the lessee.⁵⁵ Because the jurisprudence interpreting the obligation created by Article 2692 in the surface lease contract does not reveal that damages which flow from a failure in performance are to be equitable in nature,⁵⁶ an analysis of the sources is warranted.

The redactors of Article 2692 in its original form acknowledge Pothier as a source for the provisions codified by it.⁵⁷ An examination of Pothier's materials concerning the contract of lease shows that the lessee has an action for "dommages et intérêts" (damages-interests) in the case of a breach by the lessor of the obligation formed by this

51. *Id.* at 697, 308 S.E.2d at 829.

52. La. Civ. Code art. 2692 states:

The lessor is bound from the very nature of the contract, and without any clause to that effect:

1. To deliver the thing leased to the lessee.
2. To maintain the thing in a condition such as to serve for the use for which it is hired.
3. To cause the lessee to be in peaceable possession of the thing during the continuance of the lease.

Note that *Williams v. James*, 188 La. 884, 178 So. 384 (La. 1938), involved a breach of paragraph (1), *Davis v. McConnell*, 146 So. 54 (La. App. 2d Cir. 1933), involved a breach of paragraph (2), and the subject case, paragraph (3).

53. La. Civ. Code. art. 2692 (1952), "history and text of former codes."

54. *Id.*

55. Specifically, La. Civ. Code art. 2692(3).

56. See *supra* text accompanying notes 38-43.

57. L. Moreau-Lislet, *Digest of the Civil Laws now in force in the Territory of Orleans* (1808) (Reprint 1968), Bk. 3, Ti. 8, Ch. 2, Sect. II, Art. 17. The manuscript also cites *Las Siete Partidas* as a source of these provisions. The relevant provision, establishing lessor's obligations, is in line with the French sources. *Las Siete Partidas*, Part V, Tit. VIII, Law XXI (Scott trans. 1931).

article.⁵⁸ In his discussion of actions arising from the lessor's breach of his obligation⁵⁹ to provide peaceable possession, Pothier states that the damages contemplated "follow the general principles . . . [which] result from the failure to perform obligations, consisting of the diminution which the failure . . . caused the lessee, and the gain or profit of which he was [deprived]."⁶⁰ This concept of damages is the same as that embodied by the Louisiana Civil Code under the title *Conventional Obligations or Contracts*.⁶¹ The principle of money damages for a lessor's breach has been followed in relevant doctrine through the years and mention is not made of equitable remedies of the nature employed in *McCrary*.⁶² Additionally, no mention is made of an ability of the courts to grant specific performance. It becomes obvious, then, that the doctrinaires did not consider specific performance to be available, as they do consider it the preferred relief where it is available.⁶³ Therefore, it

58. M. Pothier, *Traité du Contrat du Louage et Traité des Cheptels* (1806) 49 [hereinafter Pothier]. Pothier advises that in addition to damages and interests, an action may be taken by the lessee to have the lessor remove constructions placed upon the lease premises subsequent to execution of the lease, which interfere with the lessee's peaceable possession of the lease premises. This is a compelling of specific performance of the obligation of the lessor to maintain the thing in a condition such as to serve for the use for which it is hired. See La. Civ. Code arts. 2692(2) and 2698; Article 1723 of the Code Napoleon, Official Translation of 1804 [C. Civ.] (1824).

59. According to Pothier, the obligation to provide peaceable possession arises from the particular nature of lease. M. Pothier, *supra* note 58, at 29 (Pothier claims that these obligations, i.e. those created in Louisiana Civil Code Article 2692, also arise from "the good faith which must prevail in all contracts" (emphasis added)). Compare *infra* text accompanying notes 98-99.

60. M. Pothier, *supra* note 58, at 39.

61. Compare *supra* note 37, text of La. Civ. Code arts. 1994-1997, with M. Bugnet, *Oeuvres de Pothier, Traité des Obligations, annotées et mises en corrélation avec le Code civil et la législation* 76-84 (1861). See also 2 S. Litvinoff, *Obligations* § 179, at 336, in 7 *Louisiana Civil Law Treatise* (1975) ("[T]he expected performance that can no longer take place[] is replaced by a money indemnity: damages (*dommages-intérêts*)") (emphasis in the original).

62. 1 G. Baudry-Lacantinerie & A. Wahl, *Traité Théorique et Pratique de Droit Civil—Du Contrat de Louage* 245-46 (3d ed. 1906); 11 C. Beudant, *Cours de Droit Civil Français* §§ 491-99, 436-44 (2d ed. 1938); A. Colin et H. Capitant, 2 *Cours Élémentaire de Droit Civil Français* 593-96 (8th ed. 1935); 17 M. Duranton, *Cours de Droit Français* §§ 59-63, 42-46 (3d ed. 1834); 25 F. Laurent, *Principes de Droit Civil Français* § 157, 174-75 (1877); 2 M. Planiol, *Traité Élémentaire de Droit Civil*, Vol. 2, Part 2, 60 (La. St. L. Inst. trans. 1957) [hereinafter Planiol] (referring the issue of damages directly to application of Article 1184 of the Code Civil); 1 M. Troplong, *Le Droit Civil Expliqué—De L'Échange et du Louage* art. 1724, 360 (3d ed. 1859). Several of these authors also note that cancellation (*résiliation*; see *infra* text accompanying note 67) of the lease is available to the lessee, but this is not a prerequisite to the award of damages. Cf. *Reed v. Classified Parking System*, 232 So. 2d 103 (La. App. 2d Cir.), writ denied, 234 So. 2d 194 (1970). Rather, the authorities note that the prerequisite to an award of damages is the *fault* of the lessor in causing the breach. Baudry-Lacantinerie, *ante*.

63. *J. Weingarten, Inc. v. Northgate Mall, Inc.*, 404 So. 2d 896 (La. 1981).

can be concluded that the use of such a remedy is not founded in the sources of the Louisiana Civil Code relating to leases.

V. DEVELOPMENT OF SPECIFIC REGULATION OF COMMERCIAL LEASES IN FRENCH LAW

Unlike Louisiana, France developed specific regulations for commercial leases as part of its commercial law.⁶⁴ Under these regulations, commercial leases are subject to special consideration regarding, for instance, the renewal of a merchant's lease at expiration of the term.⁶⁵ The obvious intent of this legislation, at its inception, was to protect commercial lessees who have considerable investment in their business locations and to prevent an unjust enrichment to lessors who could lease at an increased rate due to the augmented economic value of the location created by the prior merchant-tenant as a result of his tenancy.⁶⁶

Within the contemplation of these regulations and the jurisprudence interpreting them is the administration of clauses calling for conventional termination⁶⁷ upon a resolutive condition.⁶⁸ The jurisprudence, however, has ruled that the invocation of such a clause by a lessor in bad faith has no effect.⁶⁹ An examination of this jurisprudence reveals no use of equitable remedies for an interruption of possession created by the lessor's actions; on the contrary, it does not even consider an attempt by a lessor to seek cancellation to be an interruption of possession.⁷⁰

This is not to suggest that French courts have not intervened beyond the scope of *dommages et intérêts* to revise contracts on their own volition in certain instances. While the civil law is said not to intervene into the contract, giving it the effect of "law between the parties,"⁷¹

64. Code de Commerce [C. Com.], Appendice, Baux Commerciaux 315-44 (84th ed. Dalloz, 1989).

65. 1 Encyclopédie Dalloz Juridique, Répertoire de Droit Commercial—Baux Commerciaux 22-62 (2d ed. Dalloz, 1972) [hereinafter Encyclopédie Juridique]; M. Planiol, *supra* note 62, at 57.

66. See Loi du 30 juin 1926, § 7 (Collection Complete des Lois, Décrets D'Intérêt General, Vol. 26, 1926); Trasbot, *Legislation—La Propriété Commerciale*, 35 *Annales de Droit Commercial et Industriel Français* 121, 146 (1926).

67. The term used in the French doctrine and jurisprudence is *résiliation*. This is a term of art in French jurisprudence which literally means a termination but is distinguishable from dissolution because all previously rendered performance is given full effect. Thus in the context of leases, all previous rental payments would not have to be returned. The lease merely stops having any effects from the moment of resiliation forward.

68. Encyclopédie Juridique, *supra* note 65, at 18. ("The lease is susceptible of being terminated in its own right by the exercise of a resolutive clause included in the contract. . . .").

69. *Id.* at 19.

70. Decision Cour de Cassation [Cass. Civ. Com.] 30 janv. 1981, *Inf. Rap.* 393.

71. See La. Civ. Code art. 1983.

French courts have revised contracts to some limited extent where there has been error, fraud, duress, failure of cause, or even upon non-performance.⁷² One notable instance involved a lessee's suit for recovery upon the lessor's failure to provide possession of a valuable part of the lease object.⁷³ The revision sustained in that case by the *Cour de cassation* was a reduction of the rent to reflect the decreased value of the lease object.⁷⁴ The French court did not extend the duration of the lease. This "revision" is, in effect, only one in words because a reduction in rent in favor of the lessee is equivalent to a payment of damages by the lessor.⁷⁵

VI. COMPARING EQUITY WITH ÉQUITÉ

The *McCrary* court asserted that it was employing an equitable remedy. It did not, however, clarify the source of the remedy. Thus, it is unclear from the case report whether this was the operation of equity or *équité*.

Louisiana Civil Code article 4 states: "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages."⁷⁶ "Equity" in article 4 is a translation of the French "*équité*."⁷⁷ Its principles are expounded in the

72. Legrand, *Judicial Revision of Contracts in French Law: A Case-Study*, 62 Tul. L. Rev. 962 (1988) [hereinafter Legrand].

73. Judgment of Mar. 5, 1894, Cass. Ch. Civ., 1894 D.P.I. 509.

74. Legrand, *supra* note 72, at 1034. Compare text accompanying *supra* note 46.

75. This approach is also analogous to the provisions enumerated by La. Civ. Code art. 2700:

If, during the continuance of the lease, the thing leased should be in want of repairs, and if those repairs can not be postponed until the expiration of the lease, the tenant must suffer such repairs to be made, whatever be the inconvenience he undergoes thereby, and though he be deprived either totally or in part of the use of the thing leased to him during the making of the repairs. But in case such repairs should continue for a longer time than one month, *the price of the rent shall be lessened in proportion to the time during which the repairs have continued, and to the parts of the tenement for the use of which the lessee has thereby been deprived.*

And the whole of the rent shall be remitted, if the repairs have been of such nature as to oblige the tenant to leave the house or the room and to take another house, while that which he had leased was repairing.

(Emphasis added); and also to La. Civ. Code art. 2701:

If, in the lease of a predial estate, the premises have been stated to be of a greater extent than they in reality are, the lessee may claim an abatement of the rent, in the cases and subject to the provisions prescribed in the title: *Of Sale.*

(Emphasis in original).

76. La. Civ. Code art. 4.

77. La. Civ. Code art. 21 (1870) (compiled ed. 1972).

second sentence of that article: resort to justice, reason, and prevailing usages.⁷⁸ The provision limits the use of *équité* to situations where there is no express law. When a lessor breaches his obligation to give peaceable possession, the lessee is given an express remedy.⁷⁹ As a result, courts cannot fashion remedies under the auspices of law. As the supreme court has stated, "[c]onsiderations of equity [*équité*] are not admissible for the determination of contractual rights clearly expressed; resort may be had to natural law and reason only where positive law is silent."⁸⁰ *Équité* is a "juridical method," not a "historical" remedy.⁸¹

Equity, on the other hand, was a development of the common law, not to provide for the "unprovided for" case, but to avoid the "defects of justice" when an aggrieved party was relegated to an inadequate remedy due to the rigidity of the common law and the doctrine of *stare decisis*.⁸² But equity is not the fashioning of remedies limited only by the discretion of the court; it is still precedential in nature.⁸³ As an English court once commented:

[T]he discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised.⁸⁴

Whether exercised by discretion or by rule, equity will not intervene where damages would be an adequate remedy.⁸⁵ In similar considerations

78. La. Acts 1987, No. 124 enacted article 4. It substituted the term "justice" for the term "natural law". Comment (b) to that article indicates that the term "natural law" was replaced since it had no definition in Louisiana law. It is interesting to note that the term "justice" likewise has no definition in Louisiana law.

79. La. Civ. Code art. 2668 (stipulating that, in addition to the lease provisions, leases are governed by the title Of Conventional Obligations). See *infra* text accompanying notes 97-100.

80. *Baker v. Potter*, 223 La. 274, 280, 65 So. 2d 598, 600 (1953). It is interesting to note that the court refuses the defendant's equity argument concerning his attempts to pay delay rentals. Upon rehearing, the court, having decided earlier that the defendant's attempt to pay delay rentals had continued the mineral lease in effect by its own terms, the court suspended and extended the lease term for the defendant, a remedy resorted to even where positive law is not silent.

81. Franklin, *Equity in Louisiana: The Role of Article 21*, 9 Tul. L. Rev. 485, 497 (1935).

82. E. Fry, *Specific Performance of Contracts* 22-23 (6th ed. 1921) [hereinafter Fry]; G. Keeton and L. Sheridan, *Equity* 1-2 (3d ed. 1987) [hereinafter Keeton].

83. Keeton, *supra* note 82, at 6-7; *Haywood v. Cope*, 25 Beav. 138, 53 Eng. Rep. 589 (1858).

84. 25 Beav. at 151, 53 Eng. Rep. at 594.

85. Keeton, *supra* note 82, at 456-57.

to the instant case, where specific performance of the execution of a formal lease was demanded, and the term of the lease had since expired, English courts of equity have refused the decree.⁸⁶

Louisiana law does not provide for equity.⁸⁷ However, this is not to say that it has not crept into Louisiana jurisprudence.⁸⁸ But the argument would be moot, as neither "equity" nor "équité" would seemingly provide for the use of the remedy employed in *McCrary*.

VII. SUMMARY AND ANALYSIS

In this examination, the lack of jurisprudential guidance is evident. Louisiana courts have very rarely formed remedies in equity for lessees whose peaceable possession was breached. Common law jurisdictions follow what the majority of Louisiana cases give as the remedy: actual damages. The French doctrinal materials interpreting this obligation all adhere to "dommages et intérêts" as being the appropriate relief to an interruption of possession generally. Even where the French have developed specific rules for the administration of commercial leases, their interpretation of analogous situations still results in the award of proven damages. Even where the lessor in bad faith has sought judicial cancellation (résiliation) of a commercial lease, the French courts do not find the default notice to be a disturbance of peaceable possession.

Nevertheless, the Louisiana Second Circuit Court of Appeal found "no abuse of discretion by the trial court in suspending the lease [term]."⁸⁹ It relied upon the perceived existence of some form of equity jurisdiction to sustain this remedy. But equity [équité] is limited by Louisiana Civil Code article 4. Under the Louisiana Civil Code, rules pertaining to leases and the obligations created by that nominate contract are clearly expositied in legislation. There is no room for equity [équité] where the law is clear. Equity in the common law sense, as has been seen, would also not provide this remedy. While the courts have noted that there are instances where equity avoids injustice,⁹⁰ its application

86. See *Nesbitt v. Meyer*, 1 Sw. 223, 36 Eng. Rep. 366 (1818), and discussion contained in Fry, *supra* note 82, at 433. For a more complete analysis of the different meanings of "equity," see 2 J. Austin, *Lectures on Jurisprudence* 594-98 (3d ed. 1869).

87. See La. Civ. Code arts. 1, 3. See also *Bonneau v. Blalock*, 484 So. 2d 275, 276 (La. App. 3d Cir.), writ denied, 488 So. 2d 700-01 (1986) ("The concept of equity as provided in Article 21 [1870] is not interchangeable with the concept of equity in common law jurisdictions.").

88. See generally Tate, *The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience* 23-37, and Barham, *A Renaissance of the Civilian Tradition in Louisiana* 38-68, both reprinted in J. Dainow, *The Role of Judicial Decisions and Doctrine in Civil Law and Mixed Jurisdictions* (1974).

89. 560 So. 2d at 50.

90. *Housing Auth. v. Burks*, 486 So. 2d 1068 (La. App. 2d Cir. 1986); *Housing Auth. of St. John v. Shepherd*, 447 So. 2d 1232 (La. App. 5th Cir. 1984).

to commercial situations where the parties are of equal sophistication is not warranted.⁹¹

Commercial parties require clear direction from the law under which they guide their business actions. Obviously the plaintiffs in *McCrary* did not contemplate that judicial resolution of their dispute with the lessee would result in almost 9 years of lost rentals. Commercial parties conduct their relations with the law of the state supplementing their contractual terms. The law of Louisiana concerning contractual relations is embodied in the code and plaintiffs had every reason to believe that it would regulate any circumstance arising from that relationship.

Additionally, commercial parties should not be subject to equity where its use leads to an unreasonable loss or hardship.⁹² A lessor, in effect, sells the right of enjoyment to a thing, for a price, and with a term for that enjoyment.⁹³ The term is commonly expressed in months or years. But not any month or year is contemplated; rather, a specific starting date is employed to determine when the term will commence running. Therefore, the interpretation in a business context is not that a lessor allows enjoyment for a period of time; it is enjoyment over specified time. For instance, if A leases to B Arpent Noir for five years commencing January 1, 1990, B is entitled to peaceable enjoyment of Arpent Noir every day from January 1, 1990 until December 31, 1994. B is not entitled to make up his five year term by possession in 1990, 1992, 1994, 1996, and 1998. Nor is B entitled to start his five year term at any arbitrary time which would extend his term past December 31, 1994.⁹⁴

So, effectively, a lease is similar to a *sale* of the enjoyment of a thing as owner at a particular time. Suppose A leases to B an object for a term of one day, that day to be January 1, 1990. On January 2, 1990, A can never again lease that object on January 1, 1990. In this way, the lease is like a sale of a perishable item. Commercial lessors, therefore, deal in perishable goods: the right of enjoyment of an asset on a particular day or series of days. Within a given time frame, there are only a limited number of "days of enjoyment" which can be sold. Specific performance is likewise not available where the object of performance has perished.⁹⁵

91. See *supra* text accompanying note 13.

92. See *supra* text accompanying note 51.

93. La. Civ. Code arts. 2670, 2674.

94. Note the language of La. Civ. Code art. 2674:

To let out a thing is a contract by which one of the parties binds himself to grant to the other the enjoyment of a thing *during a certain time*, for a certain stipulated price which the other binds himself to pay him.

(emphasis added).

95. La. Civ. Code art. 1986.

When the court uses equity to suspend or extend the lease term, it is effectively giving the lessee something not bargained for. The court deprives the lessor of an asset which can never be regained. The result in *McCrary* did not eliminate, as the court suggested that it did, the unjust enrichment of the lessees. Lessors will collect fifty years of rent for fifty-nine years of occupancy. This is not that for which they bargained.

Another result of using equity in this situation is the quandary created when the situation is reversed. If a lessor seeks to evict a lessee who unjustifiably occupies the lease premises after his term has expired, the lessor can only be awarded additional rentals commensurate with the time the lessee occupied the premises. The court cannot use equity to return the time of occupancy to the lessor; it no longer exists. It does not seem equitable to use remedies for one party, regardless of good faith or bad faith, when the remedy cannot be applied in the reverse scenario. While symmetry of relief is not necessary, it is nevertheless appealing and a valid consideration in the use of equity.

Further, the use of this equitable remedy creates a chilling effect upon commercial lessors who seek to use the court to dissolve their leases. There is an underlying policy to keep goods in commerce. The effect of the decision in *McCrary*, however, may serve to leave some goods out of their fullest commercial use. The lessor whose lessee is not using the commercial property in accordance with the intent of the lease would leave the property in this limited use rather than risk the chance that his interpretation of the lease is incorrect and suffer a judicial suspension of the lease term. The lessor stands to lose his "perishable" commodity, time.

VIII. RECOMMENDATIONS

In the future the courts should rein in the formulation and use of equitable remedies in commercial contexts. Equity is not "omnipotent nor omniscient."⁹⁶ The mandate of article 4 of the Louisiana Civil Code is clear: do not proceed to equity when there is a rule to be derived from legislation.

The course of action which should be taken by the courts is simple. The relief given should be in accordance with the Civil Code. In instances where there is impracticability of specific performance, such as that in *McCrary*, resort is to damages.⁹⁷

Damages in the case where a lessor has interfered with the peaceable possession of the lessee should be determined under the guidelines of Louisiana Civil Code articles 1994-2002.⁹⁸ In the case where a lessor

96. *Heller v. Boylan*, 29 N.Y.S. 2d 653, 679 (1941).

97. La. Civ Code art. 1986.

98. See La. Civ. Code arts. 1994-2002. For the text of these articles see *supra* note 38.

seeks cancellation, and cancellation is denied, determination of the lessor's "good faith" or his "bad faith" is the key to assessment of the lessee's damages.⁹⁹ This leaves lessors who honestly believe they are entitled to cancellation the opportunity to seek judicial relief and punishes those lessors who *unjustifiably* interfere with the lessee's possession in that manner. Damages in either scenario are limited to those which can be proved. If it is difficult to assess a monetary value, resort can be made to Article 1999.¹⁰⁰ These provisions can be used effectively to recompense the lessee and do not create any ambiguity for commercial parties. Commercial parties operating under leases will have clear effects in mind for their actions and these effects will govern their business judgments.

IX. CONCLUSION

The court in *McCrory* showed no basis for its formulation of a remedy other than equity. While there was precedent for this judicial action in the Louisiana jurisprudence, the jurisprudence is obscure and the court failed to cite it. The codal provisions regulating leases do not warrant the use of such a remedy and the source doctrine is devoid of any reference to this use of equity. Our counterparts in France have consistently relied on the principle of *dommages et intérêts* to compensate an aggrieved lessee. Even where the French law has developed in the area of commercial leases, it still does not contemplate the relief used in *McCrory*.

Given the temporal element inherent in leasing, equitable remedies which extend or suspend a lease term are a deprivation of commodities not contemplated in the original lease. These remedies can yield no commensurate effect when the scenario is reversed and will discourage lessors in good faith from exercising their right to cancellation. They should not be employed.

There is no specific performance available, the object of performance having "perished." An aggrieved lessee must take his solace in actual monetary damages. If a lessee has been deprived of his opportunity to develop commercial real estate, then the court should employ its discretion to estimate the value of such a loss, but only if that value is

99. See La. Civ. Code arts. 1996, 1997; M. Planiol, *supra* note 62, at 25 (Where the lessor is held to pay damages, application should be made of art. 1150 [La. Civ. Code art. 1996], when he is in good faith, and make him responsible for the damages which he foresaw or could have foreseen at the time of the contract.).

100. See text of Article 1999 at *supra* note 38. For an application of La. Civ. Code art. 1999, see *Nipper v. Baton Rouge Railcar Services*, 526 So. 2d 824, 827 (La. App. 1st Cir.), writ denied, 530 So. 2d 84, 87 (1988) ("[W]hen plaintiff has a right of recovery, but the damages cannot be ascertained with certainty, courts have discretion to assess damages based upon all the pertinent facts and circumstances.").

insusceptible of ascertainment. When a lessor seeks cancellation and is in bad faith in doing so, then the courts may open up the doors of "foreseeability" and award the aggrieved lessee accordingly.

Geoffrey J. Orr

